Supreme Court, U.S.
FILED
JUL 13 2006
OFFICE OF THE CLERK

(21)

No. 05-1641

In The

Supreme Court of the United States

BERRELL FREEMAN,

Petitioner,

v.

GERALD A. BERGE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Petitioner, a Wisconsin prisoner, refused to comply with prison rules for receiving food service, such as the rule to wear pants when a meal is served. Since the prisoner refused to put on his pants, food was withheld.

The question is whether the court of appeals erred in concluding that petitioner failed to present sufficient evidence to justify a verdict (a) that the prisoner sustained a substantial risk of serious physical harm or (b) that respondents, prison officials, were deliberately indifferent to the prisoner's condition?

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STATEMENT OF THE CASE

Berrell Freeman is a 35-year old Wisconsin prisoner serving a 58-year sentence for armed robbery, attempted homicide, burglary, and theft with a firearm. (Tr. IA 16) He is at the high-security Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin. He brought this civil rights action for claimed damages resulting from his missing meals over a two-and-a-half year period, from April 23, 2001, to October 12, 2003. (Tr. IIB 66)

It is not as though the prison did not offer food. It did. But WSPF had dinner rules. The main one involved in this case required inmates to wear pants at the time of meal delivery. Freeman refused to wear pants. "They wanted me to put pants on. Fuck that. I ain't putting my pants on. Give me my food, man." (Tr. IA 41.) "I break rules. I admit this. I break rules all the time." (Tr. IA 40.) "[S]ometimes I follow orders. Sometimes I don't." (Tr. IA 53.)

So food was brought to his cell but, if he was not wearing pants, it was not delivered. From WSPF's point of view, he refused by not complying with the pants rule. From Freeman's point of view, he was denied food. However, Freeman agrees that for all the food "denials" enumerated in his complaint, ex. 501, he was fully aware of the rule that in order to be fed he was required to wear pants, but deliberately and knowingly violated the rule. (Tr. IA 70-78.)

Under prison policy, withholding food is permissible only for food-related behavior. It cannot be used as punishment for misbehavior generally. (Tr. IB 71, 75, 91.)

Unit manager Bradley Hompe explained that withholding meals under the meal delivery policy was not punishment; it's a refusal to be served. "If I didn't wear my pants at McDonald's, they wouldn't give me a cheeseburger." (Tr. IB 54.) The inmate only is told what he must do to be fed. (Tr. IB 70.) It is the same as when they do not put in a request to get a library book: they will not get the book. (Tr. IB 71.)

Security Director Gary Boughton put it this way. "I'm not refusing him his meal. I'm there to provide it to him. I'm giving him the opportunity to take it." (Tr. IB 92.) "Staff are there to provide the food to the inmate. They're there three times a day, 365 days a year. Inmates know the

rule. All they have to do is have trousers or shorts on." (Tr. IB 93.)

There are established protocols for dealing with non-eating inmates. Cell Unit Manager Hompe explained that the inmate is monitored to insure that he does not put himself at extreme levels of danger that may cause starvation. If an inmate misses meals for three consecutive days, or nine consecutive meals, they bring in the doctors and nurses. (Tr. IB 60.)

Dr. Linda Farley, Freeman's medical expert, noted the significance of Freeman's drinking water while not eating. "Actually a person can go several weeks – have been known to go several weeks without food, as long as they get water." (Tr. IIB 14.) Regarding WSPF's intervention protocol after three consecutive days of not eating, Dr. Farley said she "would not expect to see a significant health risk for somebody who has gone three days ... not eating but drinking." (Tr. IIB 30.) Of equal importance is that Dr. Farley concluded that Freeman was "not depriving himself of food for any great length of time until" October of 2003. (Tr. IIB 24.) WSPF medical staff intervened at that time. (TR. IIB 46-50)

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. The Decision Does Not Conflict With This Court's Holdings.

1. Freeman was daily offered food under rules with which he easily could have complied.

Freeman's petition raises a point of law that no one disputes, and he does not connect it to the facts of the case.

Everyone agrees – the district court, the court of appeals, and respondents – that prisons must provide prisoners with nutritious food. The uncontradicted fact in this record is that the prison brought a meal to Freeman's cell three times a day, seven days a week. Security Director Boughton explained: "Staff are there to provide the food to the inmate. They're there three times a day, 365 days a year. Inmates know the rule. All they have to do is have trousers or shorts on." (Tr. IB 93.) But since Freeman refused to comply with the rules for meal service, he was treated as having refused his meals.

The food service rules Freeman defied are eminently reasonable. He refused to put his pants on, sometimes would not stand mid-cell with lights on, would wear a sock around his head, and, on one occasion, failed to clean the blood and feces he had smeared on the walls of his cell. Petitioner's Appendix ("Apdx") 13a. The district court explained that these rules could be justified as designed to "decrease

incidents of sexual exhibitionism, safety (standing in mid-cell with the lights on protects the officers who are setting food trays on the trap, as does not being able to wear a sock around one's head to hide a potential weapon), health and cleanliness." *Id.*

The court of appeals likewise agreed with the reasonableness of the rules. Citing respondents' counsel's opening statement, "[T]here are a lot of women security officers working in this facility so they are entitled to basic privacy." Apdx 3a. Further, there are security issues such as "[i]nmates throw urine, feces, expose themselves, ejaculate, and to prevent that from happening to any security officer, there is a rule that the inmate must be clothed." *Id.* Additionally, the court of appeals observed that the sock "posed a potential threat to the guards" and the blood and feces raised the possibility of food contamination. *Id.*[1]

Critically, the court of appeals noted that Freeman "could readily have complied with" these rules, and "he offers no excuse for his non-compliance." Apdx. 3a. Freeman's problems were "self-inflicted." *Id.* 7a. Even here, Freeman effectively concedes the validity of the rules. He offers this Court no excuse for his obstinacy.

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[1] The court agreed that an inmate's being asleep at mealtime would not justify a refusal to feed (depending on whether the guards had reason to fear his reaction to being awakened or could not be awakened), "[b]ut Freeman failed to show how many of his missed meals were missed for reasons that cannot be easily related to the refusal to comply with a reasonable condition on the receipt of food," with an exception that did not rise to the level of a violation. Apdx 3a.

2. Freeman failed to produce evidence that his self-inflicted hunger subjected him to a substantial risk of serious harm. The prison intervened before that happened.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." *See generally, Estelle v. Gamble*, 429 U.S. 97 (1976). There are two elements to an Eighth Amendment claim. One is objective. It asks, "was the deprivation sufficiently serious?" *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The second is subjective. It asks, "did the officials act with a sufficiently culpable state of mind?" *Id.* A plaintiff must prove up both components. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, *id.* at 301, n.2.

Under the objective test, the plaintiff must be subjected to "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Freeman fails to deal with the testimony. As captured by the district court,

- He adduced no evidence that before October 2003 he had ever been denied more than nine meals in succession, "so as to trigger the institution's policy of bringing in a doctor and nurse to assess an inmate's health status," Apdx 16a;
- He admitted that "nurses started visiting him in October, which is when he missed nine consecutive meals," *id*;
- He continued to drink water even when he missed meals, *id*;

- He saw nurses during the periods when he was not receiving every meal, *id*;
- Dr. Linda Farley, his own expert, testified that his lack of food could have caused him headaches, dizziness, muscle weakness, inability to stand for long periods of time and difficulty breathing and talking "but she did not identify these particular consequences as serious physical harm," *id;*
- Dr. Farley testified "that so long as plaintiff was drinking water, he could go without food for several weeks before experiencing organ failure," *id*;
- Dr. Farley testified that starvation, or organ failure, would be the end of a continuum of physical harm that individuals suffer as a result of lack of food and that "nothing in plaintiff's medical records showed that he had come anywhere near the point of organ failure," *id;*
- Dr. Farley testified that "she would not expect to see a significant health risk where an individual goes three days without eating but continues to drink liquids," *id.* 17a;
- Dr. Farley observed from the records that "on several occasions a Dr. Maier had ordered a high caloric, high protein diet for plaintiff when he was losing weight and that the diet orders were carried out," *id.*;
- "There was no evidence that any of his physical problems amounted to serious harm," *id.*

The court of appeals likewise observed that, although Freeman twice did not receive a timely medical inspection after missing nine consecutive meals, nevertheless "there is no indication that his life or health was jeopardized." Apdx 7a.

3. The prison officials aggressively dealt with his condition. They were not deliberately indifferent.

This Court set forth the subjective standard in prison conditions cases in *Farmer v. Brennan*, 511 U.S. 825 (1994). Distinguishing the higher *mens rea* element for excessive force cases, which requires purposeful infliction of harm, *id.* at 835-36, the Court held that "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* at 836. More specifically, the Court said:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

The district court cited the numerous efforts to deal with Freeman's recalcitrance and its health consequences.

- In October 2003 the institution initiated its hunger strike protocol, and "nurses began monitoring plaintiff, giving him information about the risks of not eating and assessing his vital signs," Apdx 17a;

- Under this protocol, "the nurses would have had a doctor see him and they could have taken additional steps to assess his condition, such as weighing him and drawing blood for analysis," *id*;
- The protocol called for "an incident report" with notice going "to the health services unit, clinical services, the unit manager and the security director," *id.*;
- At that point, the inmate is placed on a monitoring program "and both the sergeant and the unit manager talk to the inmate to try to find out why he is refusing meals," *id;*
- Then, a "multidisciplinary meeting is held to discuss the inmate ... to make sure that the inmate is being monitored and the doctor is assessing him," *id.*;
- In some cases, "the institution will notify lawyers and obtain a court order for forced feeding or hydration," *id.*

As to the fact, at least according to Freeman's testimony, that he twice passed beyond the nine-consecutive meal rule, there is no evidence that any named defendant knew about it. As the court of appeals said, "[T]here is no evidence that the defendants knew that he was endangering his health sufficiently to require drastic intervention." Apdx 7a. "He was visited by nurses who confirmed that he was taking water ... and he was visited by a doctor as well though at some point he began refusing to see the doctor." *Id.*

The court of appeals also identified the enormously practical problems prisons face with such a deliberately disobedient inmate. To counsel's suggestion that he be placed in segregation for his misconduct, the court observed

that he already ***was*** in segregation; that is why food service was being brought to his cell. Apdx 4a. To the suggestion that he be denied good-time credits, the court observed that with a 58-year sentence and his "propensity for obstreperous behavior, it is unlikely that a denial of good-time credits will inflict significant disutility on him." *Id.* Denying privileges would not work because "he has been denied privileges, without the denial having deterred him from continuing to violate the food rule." *Id* In short, the arguments failed to note "the practical limitations of prison discipline as a means of maintaining an orderly environment." *Id.* Freeman had pointed to "no alternatives that would have been more efficacious." *Id.* What is a prison to do with this fellow?

4. The court of appeals followed this Court's holdings.

It is clear, contrary to Freeman's suggestion, that the court of appeals did not relieve prison officials from responding to substantial risks of serious harm. It said, a prison cannot "allow a prisoner to starve himself to death, or even starve himself to the point at which he seriously impairs his health." Apdx 4a-5a. It well might be that the prison must "force-feed the prisoner to prevent him from seriously endangering his health." Apdx 5a. Other situations requiring prison intervention arise when the underlying behavior is suicidal or insanity-based. *Id.* The court decidedly did not license prison indifference.

The Eighth Amendment is designed to protect prisoners who cannot help themselves. "[A] prison official's duty to protect an inmate from harm arises because the state has placed him 'under a regime that incapacitates [him] to exercise ordinary responsibility for his own welfare.'" *Christopher v. Buss*, 384 F.3d 879, 883 (7th Cir. 2004)

(quoting from *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998)). Therefore, a bump in the ground on a prison baseball field did not violate the Eighth Amendment, even though it caused an injury, because the inmate was in a position to exercise caution to protect himself. *Christopher v. Buss, id.* The Eighth Amendment does not aid an inmate who deprives himself despite having full control of the situation.

Freeman would use the Eighth Amendment as a sword to subvert reasonable rules for an orderly institution. As the Seventh Circuit stated in a factually very similar case,

> A prisoner cannot force the prison to change its rules by going on a hunger strike and blaming the prison for his resulting loss of weight. ... He cannot, in short, be permitted to engineer an Eighth Amendment violation. ... The analogy is to civil contempt. A person who is imprisoned for refusing to sign a deed that he is legally obligated to sign, but who can get out of prison just by singing it, cannot complain that he is being punished. ... It is the same here.

Rodriguez v. Briley, 403 F.3d 952, 953 (7th Cir. 2005) (internal citations omitted).

In sum, neither the respondents nor the court of appeals ignored the respondents' duty to protect an inmate from the risk of serious harm. Neither ignored the duty to provide inmates with nutritious food. Nor did they ignore the duty to defer to jury verdicts where there is evidence to support them. Here, there was no evidence of serious harm. There was no evidence of deliberate indifference.

B. The Seventh Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

Freeman's petition does not cite another circuit decision on all fours. He cites decisions at the pleading stage. At the pleading stage complaints must be liberally construed to enable a plaintiff to develop a set of facts to support a recovery. The court may dismiss a complaint for failure to state a claim only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Freeman had the full benefit of these rules. In fact, the district court denied respondents' motion for summary judgment because it "was undisputed for the purpose of summary judgment ... that he had been denied food repeatedly for periods lasing several days or longer." Apdx 14a. Freeman's problem is not that the courts did not apply these liberal rules to enable him to prove his case with competent evidence. His problem is that he lacked sufficient evidence both as to the element of serious harm and as to the element of deliberate indifference.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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